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NO. COA08-363

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 06 CRS 238982

SEBASTIAN MARTIN FERNANDEZ

Appeal by defendant from judgment entered 5 September 2007 by Judge J. Brently Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 September 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald M. Robbins, for the State.

Moser, Schmiddy, & Rose, by Richard G. Rose, for defendant-appellant.

BRYANT, Judge.

Sebastian Martin Fernandez (defendant) appeals from a judgment entered upon a jury verdict finding him guilty of second-degree rape.

The State presented evidence tending to show the following: On 16 August 2006, Jennifer Fernandez placed a call to the 911 operator in Charlotte, North Carolina. Mrs. Fernandez reported that her estranged husband, the defendant, had raped her in her home. Several officers from the Charlotte-Mecklenburg Police Department were dispatched.

Officer S.J. Kelly testified he was the first officer to arrive at the home. When he arrived, Officer Kelley first interviewed Mrs. Fernandez to ascertain the facts surrounding the incident, then placed defendant in handcuffs. Officer Nathaniel Strother also arrived at the Fernandez home and escorted Mrs. Fernandez to the Presbyterian Hospital for an examination. Defendant was escorted to police headquarters.

Detective Matt Davis testified he was on duty the night of 16 August 2006 and interviewed defendant. Prior to the interview, Detective Davis escorted defendant to the sexual assault evidence collection room where a technician collected evidence from defendant's body as well as photographed scratches and other injuries found on defendant's body. After evidence was collected, Detective Davis escorted defendant to an interview room and questioned defendant. The interview was videotaped.

Keri Parker, a nurse, testified that she examined Mrs. Fernandez at the emergency room after another nurse conducted a preliminary examination. Nurse Parker was tendered as an expert in sexual assault examinations and forensic nursing. Nurse Parker testified Mrs. Fernandez gave a history of the events leading up to her arrival at the emergency room. Nurse Parker collected evidence with Mrs. Fernandez's consent using a sexual assault kit.

Defendant was indicted for second-degree rape and second-degree sexual offense. On 5 September 2007, a jury found defendant guilty of second-degree rape. Defendant appeals.

Defendant argues the trial court erred by: (I) admitting a written statement made by Mrs. Fernandez; (II) admitting a transcript of defendant's video-recorded statement; (III) admitting a statement made by Mrs. Fernandez to Nurse Parker; (IV) allowing Nurse Parker to testify regarding Mrs. Fernandez's credibility; and (V) denying defendant's motion to dismiss at the close of all the evidence. Defendant also argues: (VI) his right to a fair trial was prejudiced because of the cumulative errors committed by the trial court.

I

Defendant argues the trial court erred by admitting a note handwritten by Mrs. Fernandez, defendant's wife. We disagree.

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 803, a recorded recollection is not excluded by the hearsay rule:

5) Recorded Recollection.- A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

N.C.G.S. § 8C-1, Rule 803(5) (2007). In order to admit a "recorded recollection" pursuant to Rule 803(5), the party offering the recorded recollection must show that the proffered document meets three foundational requirements:

(1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient

recollection as to such matters; (3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined [and adopted] . . . when the matters were fresh in [her] memory.

State v. Love, 156 N.C. App. 309, 314, 576 S.E.2d 709, 712 (2003). The evidence presented at trial established each of the three foundational requirements. Mrs. Fernandez testified that she could not remember the events that occurred on the night of 16 August; that the statement was written in her handwriting and signed with her signature; that she wrote the statement on 16 August; and that she was sure she could remember the events at the time she wrote the statement. Accordingly, we hold the trial court did not err when admitting Mrs. Fernandez's statement. Defendant's assignment of error is overruled.

II

Defendant next argues the trial court committed plain error by admitting into evidence the transcript of defendant's videotaped statement. We disagree.

Although defendant initially objected pursuant to a motion *in limine* to the State admitting the transcript into evidence, defendant failed to renew his objection when the transcript was admitted into evidence. "A motion *in limine* is not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial." *State v. Brown*, 178 N.C. App. 189, 192, 631

S.E.2d 49, 51-52 (2006). Therefore, we review defendant's assignment of error for plain error.

"Plain error is error so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Holbrook*, 137 N.C. App. 766, 767, 529 S.E.2d 510, 511 (2000) (internal quotations omitted).

The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotations omitted) (emphasis omitted). "[D]efendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

Rule 1002 of the North Carolina Rules of Evidence, commonly known as the "best evidence rule," "requires that secondary evidence offered to prove the contents of a recording be excluded whenever the original recording is available." *State v. York*, 347

N.C. 79, 91, 489 S.E.2d 380, 387 (1997); N.C. Gen. Stat. § 8C-1, Rule 1002 (2007). Detective Matt Davis testified when defendant was arrested, he was taken into an interrogation room and interviewed. Defendant's interview was recorded. The trial court allowed the State to introduce the audio recording into evidence. The trial court also allowed the State to introduce the transcript of the audio recording. Although the audio recording was the "best evidence" of defendant's interview, the admission of the transcript did not prejudice defendant. The transcript only reiterated the evidence presented through the audio recording. This assignment of error is overruled.

III

Defendant argues the trial court erred by admitting the medical history of Mrs. Fernandez. We disagree.

The State presented the testimony of Keri Parker, a registered nurse, who examined Mrs. Fernandez on the evening of 16 August. Nurse Parker, tendered and accepted as an expert in sexual assault examination and forensic nursing, testified regarding Mrs. Fernandez's examination. Over defendant's objection, the trial court allowed Nurse Parker to testify regarding statements made by Mrs. Fernandez describing the events that transpired that evening. The trial court ruled the evidence was admissible pursuant to Rule 803(4) as statements made for the purpose of medical diagnosis or treatment.

Pursuant to North Carolina Rules of Evidence, Rule 803(4), statements made for the purpose of medical diagnosis or treatment

are not excluded by the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(4) (2007). In *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000), our Supreme Court set forth two inquiries that must be satisfied before hearsay evidence is admissible under Rule 803(4):

First, the trial court must determine that the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment. The trial court may consider all objective circumstances of record in determining whether the declarant possessed the requisite intent. Second, the trial court must determine that the declarant's statements were reasonably pertinent to medical diagnosis or treatment.

Id. at 289, 523 S.E.2d at 670-71.

In this case, defendant concedes the State presented evidence that Mrs. Fernandez's statements were reasonably pertinent to her medical diagnosis and treatment after the alleged rape occurred. Defendant, however, challenges whether Mrs. Fernandez intended to make the statement for the purpose of obtaining medical diagnosis or treatment.

Here, Mrs. Fernandez was examined by Nurse Parker in a hospital. Nurse Parker introduced herself to Mrs. Fernandez and conducted a physical exam. The purpose of the exam was to ascertain whether Mrs. Fernandez had suffered any injuries and whether she required any medications. Mrs. Fernandez gave medical history to Nurse Parker in order to assist in the examination. Based on the objective circumstances, the evidence presented shows that Mrs. Fernandez intended to make her statements for the purpose of obtaining medical diagnosis or treatment. This assignment of error is overruled.

Defendant next argues the trial court committed plain error by allowing Nurse Parker to testify that her examination of Mrs. Fernandez did not cause her to question the history provided by Mrs. Fernandez. We disagree.

"The testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is not admissible." *State v. Speller*, 102 N.C. App. 697, 701, 404 S.E.2d 15, 17 (1991); *State v. Jackson*, 320 N.C. 452, 358 S.E.2d 679 (1987). However, "where the expert's testimony relates to a diagnosis derived from the expert's examination of the witness in the course of treatment, it is not objectionable because it supports the credibility of the witness" *Id.*

Nurse Parker testified Mrs. Fernandez's examination revealed "no breaks in [the] skin, no abrasions, no bruising, and no swelling noted to the external or internal vaginal area." Nurse Parker also testified as follows:

Q. In your opinion as a sexual assault nurse examiner and based on your training and experience are the results of that physical examination consistent with her history that she provided you?

A. Yes, it is consistent for any kind of nonspecific penetrating trauma.

Q. Is there anything in your examination of Mrs. Fernandez that caused you to question the history that she provided?

A. No, ma'am.

Here, Nurse Parker's expert testimony was derived from an examination of Mrs. Fernandez and related to her diagnosis. Even

though Nurse Parker's testimony regarding the examination ultimately supported the history Mrs. Fernandez provided during the examination, her testimony was not that Mrs. Fernandez was believable, but that the history, as given, was consistent with Nurse Parker's medical findings. This assignment of error is overruled.

V

Next, defendant argues the trial court erred by denying his motion to dismiss at the close of all evidence. We disagree.

A defendant's motion to dismiss is appropriately denied when the State "has presented substantial evidence (1) of each essential element of the offense and (2) of the defendant's being the perpetrator." *State v. Boyd*, 177 N.C. App. 165, 175, 628 S.E.2d 796, 804 (2006). In ruling on a motion to dismiss, a trial court must view the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 186, 451 S.E.2d 211, 223 (1994).

To establish the crime of second-degree rape, the State must prove the defendant engaged in vaginal intercourse with another person by force and against the will of the other person. N.C. Gen. Stat. § 14-27.3(a)(1) (2007). The element of "by force and against the will of the other person" is present where there is evidence of force "sufficient to overcome any resistance the victim might make." *State v. Brown*, 332 N.C. 262, 267, 420 S.E.2d 147, 150 (1992). "The requisite force may be established either by

actual physical force or by constructive force in the form of fear, fright, or coercion." *State v. Scott*, 323 N.C. 350, 354, 372 S.E.2d 572, 575 (1988).

Here, the State presented substantial evidence of each essential element of second-degree rape. Evidence was presented that Mrs. Fernandez called 911 and reported that defendant raped her. Mrs. Fernandez also made a statement to Nurse Parker during an exam that defendant "threw [her] on the bed" and "grabbed [her] right leg" and "pinned [her] down." Mrs. Fernandez also stated defendant "forced his penis inside [her] vagina" and told Mrs. Fernandez "don't make me hurt you." The State also presented photographic evidence corroborating Mrs. Fernandez's statement to Nurse Parker that she scratched defendant while fighting him. The evidence presented by the State established each element of second-degree rape. Therefore, the trial court did not err by denying defendant's motion to dismiss. This assignment of error is overruled.

VI

Lastly, defendant argues his due process rights were violated because of the numerous errors committed by the trial court. Because we have found no prejudicial errors committed by the trial court, defendant's final contention is without merit. This assignment of error is overruled.

For the foregoing reasons, we find no prejudicial error.

NO PREJUDICIAL ERROR.

Judges WYNN and ARROWOOD concur.

Report per Rule 30(e).